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MCAT Gen Sdn Bhd v Celcom (Malaysia) Berhad

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO: S6-23-74 OF 2005
ABDUL MALIK ISHAK J
23 APRIL 2007

C *Civil Procedure — Consolidation — High Court suits — Similarity of subject matter — Possibility that a conflicting decision would be arrived at based on the same set of facts — Just, efficient and uniform determination — The solicitors for the litigants are the same — O 4 r 1(1)(a)(b)(c) RHC 1980 — Whether fit and proper case to be consolidated*

D The plaintiff in this S6 suit is a company known as MCAT GEN SDN BHD ('MCAT'), whilst the plaintiffs in the S4 suit are the directors of MCAT. The defendant in this suit is also named as the sole defendant in the S4 suit. Enclosure 19 is the defendant's application to consolidate the S6 suit with the S4 suit. Alternatively, the defendant seeks an order that the S4 suit be transferred to this E Court to be heard together with or after the determination of the S6 suit.

MCAT filed this suit premised on a cause of action in libel claiming that the defendant has defamed MCAT by virtue of the words published in various newspaper articles and/or websites and has averred that it ought to be awarded general damages in the sum of RM1 billion (the S6 suit). The defendant filed its statement of defence F and counterclaim stating that there is no contract between MCAT and the defendant to re-sell the defendant's products on either a post-paid and/or on a pre-paid basis. The defendant did not publish the words set out in the articles or websites referred to and is not responsible for the articles written and published by the New Straits Times, Utusan Malaysia, Harian Metro and Berita Harian, and the defendant only G issued a press statement dated 14 October 2005. The defendant also pleaded that MCAT has failed and/or neglected to expressly plead the publication of the defendant's press statement and the defendant's press statement issued by the defendant is not defamatory of MCAT. The defendant counterclaimed and pleaded that MCAT has attempted to pass-off its products as that of the defendant and the defendant is seeking an injunction to restrain such conduct. Thereafter the defendant H filed an application to strike out the S6 suit.

The directors of MCAT filed the writ of summons and the statement of claim (the S4 suit). The defendant filed its statement of defence and counterclaim and adopted an identical line of defence as in the S6 suit. The defendant also counterclaimed that Mohd Razi Adam, the fifth plaintiff in the S4 suit has breached his fiduciary I obligations in disclosing confidential information to MCAT and acting in conflict of interest during his tenure with the defendant. Thereafter, the defendant filed an application to strike out the MCAT's directors claims on similar grounds like that of the S6 suit. Both the applications to strike out in the S4 & S6 suits are pending decisions by the SAR.

Held, allowing encl 19 and ordering that the S4 suit be transferred to S6 court and costs in the cause:

(1) Under O 4 r 1 of the RHC, the court may order consolidation if one of the limbs mentioned therein is satisfied: that some common question of law or fact arose in both or all of them or that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order under this rule (see para 29).

(2) With similar issues of fact and liability for both the S6 suit and the S4 suit, it would thus be expedient for one judge to determine both the suits and try them either together or consecutively, one after the other, before the Kuala Lumpur High Court Civil Division 6. In the event that these two suits are not heard, one after the other, there is a danger that there may be different decisions by two different courts on similar issues arising out of similar facts (see para 36).

(3) The plaintiff in the S6 suit and MCAT's directors in the S4 suit will be required to furnish identical evidence in relation to their libel claim. If the matters are not heard by this court, one after the other, not only will the defendants have to expend time and costs in defending both actions separately before a different judge, but it may also be prejudiced by any inconsistent finding of facts or law by two different courts. It is certainly in the interest of all the parties to expedite and not to delay both the suits. Consolidation of both the suits or transferring the S4 suit to this court which is the preferred choice is not an attempt to delay but rather to expedite matters and to enable both the S4 suit and the S6 suit to be heard and disposed together or separately as expeditiously as possible by the same judge. Much judicial time will be saved as a result of transferring the S4 suit to this court (see para 38).

[Bahasa Malaysia summary

Plaintif dalam guaman S6 ini adalah sebuah syarikat yang dikenali sebagai MCAT GEN SDN BHD ('MCAT'), manakala plaintif dalam guaman S4 adalah pengarah-pengarah MCAT. Defendan dalam guaman ini juga dinamakan sebagai satu-satunya defendan dalam guaman S4. Lampiran 19 merupakan permohonan defendan untuk menggabungkan guaman S6 dan guaman S4. Secara alternatifnya, defendan memohon satu perintah bahawa guaman S4 dipindahkan ke Mahkamah ini untuk didengar bersama-sama dengan atau selepas penentuan guaman S6.

MCAT memfailkan guaman ini bersandarkan kepada kausa tindakan fitnah bertulis yang mendakwa defendan telah menfitnah MCAT melalui perkataan-perkataan yang diterbitkan dalam artikel surat-surat khabar tertentu dan/atau laman web dan telah menyatakan ia perlu diawardkan dengan gantirugi am untuk sejumlah RM1 bilion (guaman S6). Defendan telah memfailkan penyataan pembelaannya dan tuntutan balas dengan menyatakan bahawa tiada kontrak antara MCAT dan defendan untuk menjual semula produk-produk defendan ke atas pasca bayar dan/atau pra bayar. Defendan tidak menerbitkan sebarang perkataan sepertimana dalam artikel-artikel dan laman-laman web yang telah dirujuk dan tidak bertanggungjawab untuk artikel yang ditulis dan diterbitkan oleh New Straits Times, Utusan Malaysia, Harian Metro

dan Berita Harian, dan Defendan hanya mengeluarkan kenyataan akhbar pada 14 Oktober 2005. Defendan juga memplidkan bahawa MCAT telah gagal dan/atau mengabaikan untuk memplidkan secara jelas penerbitan kenyataan akhbar defendan dan kenyataan akhbar defendan yang dikeluarkan oleh defendan adalah bukan fitnah kepada MCAT. Defendan telah membuat tuntutan balas dan memplidkan bahawa MCAT telah mencuba untuk kelirupaan produk-produknya seperti defendan dan defendan memohon untuk satu injunksi bagi menahan perlakuan tersebut. Selanjutnya, defendan memfailkan satu permohonan untuk membatalkan guaman S6.

Pengarah-pengarah MCAT telah memfailkan writ saman dan Pernyataan Tuntutan (guaman S4). Defendan memfailkan Pernyataan Pembelaan dan Tuntutanbalas dan menggunapakai barisan pembelaan yang sama seperti dalam guaman S6. Defendan telah menuntut balas bahawa Mohd Razi Adam, plaintif kelima dalam guaman S4 telah melanggar kewajipan fidusiari dalam mendedahkan maklumat sulit kepada MCAT dan bertindak dalam konflik kepentingan semasa memegang jawatan dengan defendan. Selanjutnya, defendan telah memfailkan satu permohonan untuk membatalkan tuntutan pengarah-pengarah MCAT atas alasan sama seperti dalam guaman S6. Kedua-dua permohonan untuk membatalkan guaman S4 dan guaman S6 adalah menunggu keputusan-keputusan PKP.

Diputuskan, membenarkan lamp 19 dan memerintahkan guaman S4 ditukarkan kepada S6 kos dalam kausa

(1) Dalam Aturan 4 kaedah 1 KMT, mahkamah boleh mengarahkan penggabungan jika satu perkara tersebut didalamnya telah dipenuhi; bahawa sesetengah persoalan undang-undang biasa atau fakta timbul dalam kedua-duanya atau kesemuanya atau bahawa hak-hak kepada relif yang dituntut didalamnya adalah berkenaan atau timbul daripada transaksi sama atau transaksi-transaksi berturutan atau dengan sebab-sebab lain ia berhasrat untuk membuat perintah di bawah aturan ini.

(2) Dengan isu-isu yang sama dan liabiliti untuk kedua-dua guaman S6 dan guaman S4, ia dengan itu akan mewajarkan bagi seseorang hakim untuk menentukan kedua-dua guaman dan membicarakannya sama ada secara bersama atau berturutan, selepas salah satu daripadanya, di Mahkamah Tinggi Kuala Lumpur Bahagian Sivil 6. Dalam keadaan kedua-dua kes ini tidak didengar, selepas salah satu daripadanya, terdapat bahaya bahawa akan ada perbezaan keputusan-keputusan oleh dua mahkamah yang berbeza ke atas isu-isu yang sama yang timbul daripada fakta-fakta yang sama.

(3) Plaintif dalam guaman S6 dan pengarah-pengarah MCAT S4 diperlukan untuk mengemukakan keterangan-keterangan serupa untuk tuntutan fitnah bertulis mereka. Jika perkara ini tidak didengar oleh mahkamah ini, selepas salah satu daripadanya, bukan hanya defendan terpaksa menggunakan masa dan kos untuk mempertahankan kedua-dua tindakan secara berasingan di hadapan hakim yang berbeza, tetapi ia akan diprejudiskan dengan penemuan-penemuan fakta-fakta dan perundangan yang tidak konsisten oleh dua buah mahkamah yang berbeza. Ia secara jelas adalah untuk kepentingan kesemua pihak bagi mempercepatkan dan tidak melengah-lengahkan

kedua-dua tindakan guaman. Penggabungan kedua-dua guaman atau memindahkan guaman S4 ke mahkamah ini yang mana lebih disukai, bukan satu percubaan untuk melengah-lengahkan tetapi lebih kepada mempercepatkan perkara-perkara dan membolehkan kedua-dua guaman S4 dan guaman S6 didengar bersama dan diputuskan bersama-sama atau secara berasingan secepat yang mungkin oleh hakim yang sama. Lebih banyak masa kehakiman dapat dijimatkan berikutan keputusan memindahkan guaman S4 ke mahkamah ini.]

Notes

For cases on consolidation of High Court suits, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 85–89.

Cases referred to

Arab Monetary Fund v Hashim (No 4) [1992] 2 ALL ER 860 (refd)
Baring Futures (Singapore) Pte Ltd (in liquidation) v Deloitte & Touche (a firm) & Anor [1997] 3 SLR 312 (refd)
Central Securities (Holdings) Bhd v Haron Bin Mohamed Zaid [1979] 2 MLJ 244 (refd)
Davies v Solomon (1871) LR 7 QB 112 (refd)
Del E Webb International Hotel Co v Hotel Merlin (Penang) Sdn Bhd [1973] 1 MLJ 31 (refd)
Healey v Waddington & Sons Ltd [1954] 1 ALL ER 861 (refd)
Hopwood v Thorn (1849) 8 CB 293 (refd)
Horwood v British Statesman Publishing Co Ltd (1929) WN 38 (refd)
Lewis v Daily Telegraph [1964] 2 QB 601 (refd)
Martin v Martin (1897) 1 QB 429 (refd)
Ratcliffe v Evans (1892) 2 QB 524 (refd)
Stanhope v Blith (1585) 4 Co Rep 15a (refd)

Legislation referred to

Rules of the High Court 1980 O 4 r 1(1)(a), (b) and (c)

Christie Soosay Nathan (Muzaffirah bte Tun Dato' Seri Ahmad Fairuz with him) (Christie Soosay Nathan & Associates) for the plaintiff.
Ned Segaram (Sunil Abraham with him) (Shearn Delamore & Co) for the defendant.

Abdul Malik Ishak J:

ENCLOSURE 19

[1] By this enclosure, the defendant seeks the following reliefs:

(1) that the present action, namely, the Kuala Lumpur High Court Civil Suit No: S6-23-74-2005 ('S6 suit') and the Kuala Lumpur High Court Civil Suit No: S4-22-23-77-2005 ('S4 suit') be consolidated and thereafter proceed with as one suit with the S6 suit as the first suit;

(2) that the title of the S4 suit be amended by adding to it the title of the present suit;

(3) all necessary and proper directions as to the conduct and carriage of the consolidated suit be given by this Honorouble Court; and

(4) in the alternative to (a) above, that the S4 suit be transferred to the Kuala Lumpur High Court Civil 6 division to be heard together with or after the determination of the S6 suit;

(5) that the costs of this application be costs in the cause; and

(6) such further and/or other relief as this Honourable Court deems fit and proper to grant.

[2] The primary grounds in support of the defendant's application in encl 19 are as follows:

(i) there is a similarity in the subject matter of the two suits and some of the issues that lie for determination in both the suits are also similar, consequently, it is a fit and proper case for the two suits to be consolidated and heard together;

(ii) if the S4 suit and the S6 suit are not consolidated and/or tried by the same court as is the present circumstance, there is a possibility that a conflicting decision would be arrived at based on the same set of facts;

(iii) that the S4 suit should be consolidated with the S6 suit and/or in the alternative, the S4 suit ought to be transferred to the Kuala Lumpur, High Court civil 6 division to be heard together with or after the determination of the S6 suit so as to enable the just, efficient and uniform determination of the similar issues existing in these two suits and to avoid conflicting decisions which may arise;

(iv) there would be a substantial saving of costs and time if the S6 suit and the S4 suit were to be consolidated and /or tried jointly or consecutively before a single judge;

(v) the solicitors for the litigants are the same;

(vi) the reliefs sought for by the plaintiff arises out of the same action; and

(vii) as a matter of law, the provisions of O 4 r 1(1)(a), (b) and (c) of the Rules of the High Court 1980 ('RHC') have been satisfied.

[3] It is the stand of the defendant that this application in encl 19 is filed without prejudice to the defendant's application to strike out the plaintiff's claim as seen in encl 6. It is quite obvious that the issues in respect of the defendant's striking out application are not relevant to the issues and the law relating to the present application for consolidation. This judgment also emphasises the need to transfer the S4 suit to this court and the hearing of the S4 suit after the S6 suit.

WHAT ARE THE UNDISPUTED FACTS?

[4] The plaintiff in this suit is a company known as MCAT GEN SDN BHD ('MCAT'), whilst the plaintiffs in the S4 suit are the directors of MCAT.

[5] The defendant in this suit is also named as the sole defendant in the S4 suit. **A**

THE S6 SUIT

[6] On 23 November 2005, MCAT filed its writ of summons and the statement of claim premised on a cause of action in libel. Briefly, MCAT's claim against the defendant may be stated as follows: **B**

(a) that the defendant has defamed MCAT by virtue of the words published in the following newspaper articles and/or websites:

- an article that appeared in the New Straits Times dated 17 October 2005 entitled 'Celcom denies ties with MCAT'; **C**
- an article that appeared in the New Straits Times dated 19 October 2005 entitled 'Celcom maintains stand on MCAT';
- the re-publication of New Straits Times articles entitled 'Celcom denies ties with MCAT' and 'Celcom maintains stand on MCAT' that appeared on the New Straits Times website; **D**
- an article appearing in Utusan Malaysia entitled 'Celcom nafi ada kaitan dengan iklan MCAT';
- the re-publication of Utusan Malaysia article entitled 'Celcom nafi ada kaitan dengan iklan MCAT' on the Utusan Malaysia website; **E**
- an article appearing in Harian Metro entitled 'Celcom nafi kaitan dengan iklan MCAT'; and
- an article appearing in Berita Harian entitled 'Celcom nafi jalin kerjasama dengan MCAT' **F**

(b) it is averred that MCAT ought to be awarded general damages in the sum of RM1b.

[7] On 9 January 2006, the defendant filed its statement of defence and counterclaim and there the defendant states that: **G**

(a) there is no contract between MCAT and the defendant to re-sell the defendant's products on either a post-paid and/or on a pre-paid basis;

(b) the defendant did not publish the words set out in the articles or websites referred to above; **H**

(c) the defendant is not responsible for the articles written and published by the New Straits Times, Utusan Malaysia, Harian Metro and Berita Harian;

(d) the defendant only issued a press statement dated 14 October 2005 (hereinafter referred to as the 'defendant's press statement'); **I**

(e) MCAT has failed and/or neglected to expressly plead the publication of the defendant's press statement; and

(f) the defendant's press statement issued by the defendant is not defamatory of MCAT.

[8] In its counterclaim, the defendant has pleaded, inter alia, that MCAT has attempted to pass-off its products as that of the defendant and the defendant is seeking an injunction to restrain such conduct.

[9] Again, on 9 January 2006, the defendant filed an application to strike out the S6 suit on, inter alia, the following grounds:

(a) the fact that Mohd Razi Adam, the fifth defendant in the S4 suit, who is the chief executive officer and director of MCAT, has written a letter dated 13 October 2005 to the chief operating officer of the defendant by the name of Dato' Zubir A Rasid apologising for the unauthorised advertisements and promotions; and

(b) the letter dated 13 October 2005 amounts to an admission on the part of MCAT that it is not entitled to launch its pre-paid package nor advertise any association with the defendant.

THE S4 SUIT

[10] It is now ideal to say something about the S4 suit. On 30 November 2005, the directors of MCAT filed the writ of summons and the statement of claim. On 5 December 2005, the directors of MCAT filed the amended statement of claim before this court. The parties in the S4 suit are as follows:

(1) Tan Sri Abdul Rashid bin Abdul Manaf

(2) Danny Ng Siew Leong

(3) Datuk Yaacob Bin Md Amin

(4) Ungku Safian Bin Ungku Abdullah

(5) Mohd Razi Bin Adam … Plaintiffs v Celcom (Malaysia) Berhad (No: Syarikat 167469-A) … Defendant

[11] On 16 January 2006, the defendant filed its statement of defence and counterclaim wherein the defendant has adopted an identical line of defence as in the S6 suit. In respect of the counterclaim, the defendant claims that Mohd Razi Adam, the fifth plaintiff in the S4 suit, has breached his fiduciary obligations in disclosing confidential information to MCAT and acting in conflict of interest during his tenure with the defendant.

[12] Once again, on 16 January 2006, the defendant filed an application to strike out the MCAT's directors claims on similar grounds like that of the S6 suit. The defendant's striking out application was heard on 4 July 2006 before the learned Senior Assistant Registrar ('SAR') and a decision is still pending.

[13] Thus, it is clear from a review of the pleadings in both these two suits that the subject matter of the MCAT's directors claims in the S4 suit and MCAT's claim in the S6 suit are identical. Accordingly, it is proper that the matter be tried together. The duplicity of the subject matter clearly satisfies the requirements of O 4 r 1 (1)(a) and (b) of the RHC.

THE CHALLENGE MOUNTED BY THE PLAINTIFF

[14] The plaintiff vehemently challenges the defendant's application in encl 19. Briefly put, it is the defendant's application to consolidate the S6 suit with the S4 suit. Alternatively, the defendant seeks an order that the S4 suit be transferred to this court to be heard together with or after the determination of the S6 suit.

[15] The defendant had published or caused to be published words to the effect that there was/is no contractual relationship and/or association between the defendant and MCAT. This resulted in three legal proceedings being instituted in the High Court of Malaya at Kuala Lumpur, viz:

(a) D4-22-1682-2005 ('D4 suit') is a suit between MCAT and the defendant wherein the claim is for specific performance of the contract and for damages for breach of contract;

(b) the S6 suit; and

(c) the S4 suit.

[16] It must be borne in mind that the defendant had filed applications to strike out both the S6 suit and the S4 suit.

[17] The first affidavit in support of the application in encl 19 was affirmed by Dato' Mohammed Shazalli bin Ramly on 4 July 2006 as seen in encl 18. Now, paragraph 11 of encl 18 shows that the defendant had filed an application to strike out the S6 suit on 9 January 2006 while para 18 of encl 18 shows that the defendant had filed an application to strike out the S4 suit on 16 January 2006. Both the applications to strike out are pending decisions by the SAR. Enclosure 19 dated 5 July 2006 was filed approximately 4½ months after both the aforesaid applications to strike out had been filed. It is the stand of the plaintiff that given the aforesaid scenario, the defendant cannot now possibly seek to have the S4 suit consolidated with the S6 suit.

[18] Paragraph 4 of the affidavit in encl 18 clearly sets out that the application in encl 19 to consolidate was made strictly without prejudice to the pending applications to strike out the S6 suit and the S4 suit. Since the defendant has taken the position that it intends to first proceed with its applications to strike out, the plaintiff submits that the defendant is precluded from taking a contradictory position by also seeking an order to consolidate the S4 suit with the S6 suit.

THE DEFENDANT HAS COME TO COURT WITH UNCLEAN HANDS

[19] It is the submission of the plaintiff that the defendant has come to this court with unclean hands. The plaintiff argues along the following lines. In para 20(c) of encl 18, the deponent avers as follows:

> Both this suit and the S4 suit will require a determination and construction of the following issues, amongst others: whether or not there was a concluded contract between MCAT and

A the defendant as alleged by the plaintiffs in this suit and MCAT in the S4 suit? This issue lies at the heart of the justification defence pleaded by the defendant in both these suits.

[20] And in para 5.2 of the affidavit of Dato' Mohammed Shazalli bin Ramly affirmed on 8 March 2006 in support of the defendant's application to strike out the B S4 suit, the said deponent now avers as follows:

> The existence of any valid and subsisting contract between the defendant and MCAT is totally irrelevant for the purposes of the said application, contrary to the plaintiff's allegation at para 3 (ii) of the plaintiff's first affidavit. As such, I specifically deny the contention that the issue of whether or not there was indeed any such contract would materially determine C the issue of whether the defendant had defamed the plaintiff as alleged at para 3 (ii) of the plaintiff's first affidavit.

[21] It seems, according to the plaintiff that the defendant has tailored its affidavits according to the requirements of its various applications and have not hesitated to D contradict themselves on oath via the same deponent.

THE CONSOLIDATION APPLICATION IN THE S4 SUIT

[22] On 28 February 2006, the defendant filed a similar application in the S4 E court just like the present application in encl 19. Enclosure 19 itself is dated 5 July 2006.

[23] It is the plaintiff's submission that the filing of the present application in encl 19 in the S6 suit brings to naught the defendant's purported motive for filing a F similar application in the S4 suit and that would be to prevent the possibility of conflicting decisions being made on the same facts by two different courts. According to the plaintiff, the defendant has already created a situation where possibly two courts might arrive at two different decisions. With respect, the plaintiff overlooks the fact that no two judges would arrive at the same conclusions on the same set of facts. It is to avoid this mishap that the consolidation should be allowed.

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[24] The plaintiffs in the S6 suit and the S4 suit are said to be different. MCAT is the plaintiff in the S6 suit whereas Tan Sri Abdul Rashid bin Abdul Manaf, Danny Ng Siew Leong, Datuk Yaacob bin Md Amin, Ungku Safian bin Ungku Abdullah and Mohd Razi bin Adam are the plaintiffs in the S4 suit. But, I did say in the early H part of this judgment that the plaintiffs in the S4 suit are the directors of MCAT.

[25] The reasons for allowing the consolidation in the S4 suit are the same as in the S6 suit. There is therefore no necessity for me to write a separate judgment for allowing the consolidation application in the S4 suit.

I

ANALYSIS

[26] It is obvious that the defendant's application in encl 19 is made pursuant to O 4 r 1(1) of the RHC which provides as follows:

ORDER 4

CONSOLIDATION OF PROCEEDINGS

1 Consolidation, etc, of causes or matters (O. 4, r. 1)

(1) Where two or more causes or matters are pending, then, if it appears to the Court

(a) that some common question of law or fact arises in both or all of them; or

(b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or

(c) that for some other reason it is desirable to make an order under this rule

the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them."

[27] And O 4 r 1(1) of the RHC is substantially in pari materia with O 4 r 9(1) of the Rules of the Supreme Court 1965 which states as follows:

Consolidation, etc of causes or matters (0 4, r 9)

9(1) Where two or more causes or matters are pending in the same division and it appears to the Court

(a) that some common question of law or fact arises in both or all of them, or

(b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or

(c) that for some other reason it is desirable to make an order under this paragraph

the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

[28] It is ideal to put in the forefront of my mind the main principles governing consolidation. It is solely to save time and costs (Del E Webb International Hotel Co v Hotel Merlin (Penang) Sdn Bhd [1973] 1 MLJ 31). And that an order for consolidation may be made where the parties in the actions are the same person or different persons and this simple principle can be distilled from the case of *Horwood v British Statesman Publishing Co Ltd [* 1929] WN 38. According to the case of *Martin v Martin* (1897) 1 QB 429, actions may also be consolidated where it involves the same defendant, one in respect of damages sustained before or at the date of the writ, and the other in respect of damages sustained subsequently. But, where the plaintiffs in the various actions are unable to agree to a common representation by a single firm of advocates, then consolidation may not be allowed (*Lewis v Daily Telegraph* [1964] 2 QB 601 at 623). At the end of the day, the court has a discretion to make an order for consolidation even though by doing so the applicant who makes the application may gain an advantage in regard to the issue of limitation (*Arab Monetary Fund v Hashim (No 4)* [1992] 2 ALL ER 860 at 864). Here, fortunately, the issue of limitation does not arise at all.

[29] Under O 4 r 1 of the RHC, the court may order consolidation if one of the limbs mentioned therein is satisfied; that some common question of law or fact arises

in both or all of them; or that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order under this rule. In *Central Securities (Holdings) Bhd v Haron Bin Mohamed Zaid* [1979] 2 MLJ 244, the Federal Court reversed the decision of the High Court and held that consolidation of the two actions should be allowed because the parties were the same, the actions arose out of the same transactions and the questions of law and fact were common to them. And Raja Azlan Shah C.J (Malaya) (as His Royal Highness then was) in delivering the judgment of the Federal Court aptly said at p 251 of the report:

> The main purpose of consolidation is to save costs and time, and therefore it will not usually be ordered unless there is 'some common question of law or fact bearing sufficient importance in proportion to the rest' of the subject-matter of the actions 'to render it desirable that the whole should be disposed of at the same time' (*Payne v British Time Recorder Co* [1921] 2 K.B. 16, *Horwood v British Statesman Publishing Co Ltd* [1929] W.N 38, *Daws v Daily Sketch* [1960] 1 ALL E.R. 397). Where this is the case, actions may be consolidated where the plaintiffs are the same and the defendants are the same.

[30] Further down the same page, his Lordship succinctly said:

> We may add that in such circumstances, one of the tests in deciding whether consolidation should be ordered is to determine whether two inconsistent judgments will come into existence if it is not ordered.

[31] In the same vein, this was what Lai Kew Chai J said in *Baring Futures (Singapore) Pte Ltd (in liquidation) v Deloitte & Touche (a firm) & Anor* [1997] 3 SLR 312:

> Only by bringing all the principal players together before one forum or adjudication could the responsibility be justly, sensibly and more sufficiently ascertained and distributed between those concerned. This approach would avoid the potential disaster of inconsistent verdicts which could be given if similar disputes with overlapping facts involving the same or different parties were litigated before two different courts in two different jurisdictions.

[32] Partial consolidation of actions may also be ordered by the court for the purpose of deciding on the issue of liability, while the parties may pursue on their own actions on the issue of the quantum of damages (*Healey v Waddington & Sons Ltd* [1954] 1 ALL ER 861, [1954] 1 WLR 688). I will now refer to an array of authorities that are germane to the occasion at hand:

(a) In *Payne v British Time Recorder Company Limited, And W.W.Curtis Limited* [1921] 2 KB 1, a decision of the Court of Appeal with a coram of Lord Sterndale M.R, Warrington L.J, and Scrutton L.J, it was held that consolidation will not usually be ordered unless there is 'some common question of law or fact bearing sufficient importance in proportion to the rest' of the subject matter of the actions 'to render it desirable that the whole should be disposed of at the same time'. At page 15 to page 16 of the report, Scrutton L.J, writing a separate judgment had this to say:

There are later decisions which lay down that r 4 may be applied to causes of action as well as to parties; and that where there are common questions of law or fact defendants sued in respect of different causes of action may be joined.

Thomas v Moore [1918] 1 K.B. 555 is one of the latest of such decisions, and since that case was decided there has been the decision in In re Beck 87 LJ (Ch) 335.

The result of the later decisions is that you must look at the language of the rules and construe them liberally, and that where there are common questions of law or fact involved in different causes of actions you should include all parties in one action, subject to the discretion of the Court, if such inclusion is embarrassing to strike out one or more of the parties.

It is impossible to lay down any rule as to how the discretion of the Court ought to be exercised. Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time the Court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried.

(b) In *Del E. Webb International Hotel Co v Hotel Merlin Penang Sdn Bhd*, Chang Min Tat J, (as he then was) held, after an examination of the claim and the averments in the affidavits, that:

(i) the actions in Kuala Lumpur and in Penang were between the same plaintiffs and substantially the same defendants;

(ii) what was more important was that both the actions involved a common question of facts;

(iii) in the circumstances, this was a case eminently suitable for consolidation with the Kuala Lumpur action within the scope and intent of the then Order 49 rule 8 of the Rules of the Supreme Court 1957; and

(iv) an order for consolidation is within the discretion of the judge and is to be exercised when such a course appears necessary or advisable.

In the main body of the judgment, Chang Min Tat J, had this to say (see p 32 of the report):

The corresponding rule in England refers to consolidation by order of the court or a judge in the manner in use immediately before 1 November 1875, in the Superior Courts of Common Law. It has been held in *Horwood v Statesman Publishing Co Ltd* [1929] 98 LJKB 450, as stated in the footnote (h) at p 389 of *Halsbury's Laws of England (3rd Ed) Vol 30*, that this rule must be interpreted in the light of the changes of rules as to joinder of parties and causes of action. Since we have adopted these changes in our Rules of the Supreme Court, this must mean that the English law on consolidation is applicable to our courts. So far as the practice in England is concerned, it has been summarised in the same volume of Halsbury's Laws thus:

Actions relating to the same subject matter between the same plaintiff and the same defendant, or between the same plaintiff and different defendant, or between the same plaintiff and different defendants, or between different plaintiffs and the same defendant or between different plaintiffs and different defendants may be consolidated on the application of either a plaintiff or a defendant.

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> If this is the practice to be adopted in our country, our local rule serves only to make clearer that an order is at the discretion of the judge, to be exercised when such a course appears necessary or advisable. But the exercise of any discretion must of course be a judicial one and in this connection, I propose to bear in mind these words of Scrutton L.J in *Horwood v Statesman Publishing Co Ltd* which were repeated with approval by *Willmer L.J. in Daws v Daily Sketch & Sunday Graphic Ltd and Anor, Darke & Others v Same* [1960] 1 ALL E.R. 397 at p 399:
>
> The result of the later decisions is that you must look at the language of the rules and construe them liberally, and that where there are common questions of law or fact involved in different causes of actions you should include all parties in one action, subject to the discretion of the court, if such inclusion is embarrassing, to strike out one or more of the parties. It is impossible to lay down any rule as to how the discretion of the court ought to be exercised. Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact, bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time, the court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried.

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(c) In *Mayban Trustee Bhd v Amalan Tepat Sdn Bhd* [2006] 5 CLJ 43, the High Court of Seremban refused to transfer the proceedings of the Malacca originating summons to the Seremban High Court and to consolidate the Malacca originating summons with the Seremban originating summons because the defendants' applicants failed to state the common questions of law or fact that was to arise in the two originating summonses. Hence, quite apart from the common subject matter, the High Court of Seremban was unable to accept the contention that O 4 rule 1 (1)(a) of the RHC has been fulfilled.

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[33] It seems to me that the principal issue for determination revolves on this salient question; whether the requirements of O 4 r 1 of the RHC have been satisfied? The defendant argues that the requirements have been satisfied while the plaintiff argues to the contrary. It is part and parcel of this judgment that the defendant has succeeded in its application in encl 19 for the following reasons:

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(a) that the writ of summons and the statement of claim dated 23 November 2005 filed in the S6 court is identical to MCAT's directors claims in the S4 suit save that the S6 suit was brought by MCAT, the company itself;

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(b) that the plaintiffs in the S4 suit are the individual directors of MCAT, the plaintiff in the S6 suit;

(c) that the defendant in the S6 suit and the defendant in the S4 suit are the same entity; and

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(d) that the application to strike out the S6 suit is premised on the same grounds as the application to strike out the S4 suit.

[34] Now, the issue of whether or not there is a concluded contract between MCAT and the defendant is an issue that forms the subject matter of the defendant's

defence of justification in the S6 suit as well as in the S4 suit. This is clearly demonstrated by perusing through:

(a) the defendant's defence in the S6 suit at paragraphs 40 to 42; and

(b) the defendant's defence in the S4 suit at paragraphs 42 to 44.

[35] Since MCAT is the plaintiff in the S6 suit and the plaintiffs in the S4 suit are the directors of MCAT, it is my judgment that it would be appropriate that the S4 suit be transferred to this court and this court will hear and determine the S6 suit first and then followed by the S4 suit. This would certainly prevent and 'avoid the potential disaster of inconsistent verdicts' as envisaged in *Baring Futures (Singapore) Pte Ltd (in liquidation) v Deloitte & Touche (a firm) & Anor*. This approach also finds support in the following cases:

(a) *Leong Chee Kong & Anor v Tan Leng Kee* [1999] 4 AMR 4422, where the court granted consolidation of two separate suits involving the same issues, facts and parties;

(b) Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd [1988] 2 MLJ 184, S.C, where Wan Hamzah SCJ delivering the judgment of the Supreme Court aptly said at p 185 of the report:

> It is undesirable to allow a situation where two different courts would try and determine the same issues arising between the same parties relating to the same subject matter. As MBS had chosen to sue *Lesco* in the Commercial Division before filing the originating summons and there was already default judgment in the suit and the application to set aside the default judgment is still pending, in our opinion the hearing of the originating summons should have been postponed until final disposal of the suit in the Commercial Division. Therefore we order that the order of sale be set aside. We further order that the originating summons be dealt with after the final disposal of the suit, and that appropriate orders should be made on the originating summons taking into consideration the result of the suit.

(c) *Naylor v Preston Area Health Authority, Foster v Merton And Sutton Health Authority*, *Thomas v North West Surrey Health Authority*, *Ikumelo And Another v Newham Health Authority* [1987] 1 W.L.R 958, where four separate actions alleging medical professional negligence were tried at the same time particularly where the principal issue to be decided in each case was the same;

(d) *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] 1 A.C 965, a decision of the House of Lords with a coram of Lord Bridge of Harwich, Lord Brightman, Lord Mackay of Clashfern, Lord Ackner and Lord Goff of Chieveley where the motions to remit the arbitration awards that arose out of the same incident were heard together; and

(e) *Daws v Daily Sketch & Sunday Graphic Ltd And Anor Darke And Ors v Same* [1960] 1 ALL ER 397, where two actions were ordered to be tried consecutively by the same judge and by the same jury.

[36] It is apparent that both the S4 suit and the S6 suit require, inter alia, the determination and construction of the following similar issues:

A (a) whether or not there was a concluded contract between MCAT and the defendant as alleged by MCAT in the S6 suit and MCAT's directors in the S4 suit (it is this issue that lies at the heart of the defence of justification as pleaded by the defendant in both the S6 suit and the S4 suit);

(b) whether the defendant published the statements as printed in the New Straits B Times, Utusan Malaysia, Harian Metro and Berita Harian; and

(c) on the assumption that the defendant did not publish the alleged defamatory words, the question to pose would be whether the defendant is responsible for the said publication?

With similar issues of fact and liability for both the S6 suit and the S4 suit, it would C thus be expedient for one judge to determine both the suits and try them either together or consecutively, one after the other, before the Kuala Lumpur High Court civil division 6. In the event that these two suits are not heard, one after the other, there is a danger that there may be different decisions by two different courts on similar issues arising out of similar facts.

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[37] There would be a substantial saving of time and costs if both the suits are heard together or separately, one after the other, bearing in mind that the claims in both the suits bore striking similarities. The following factors are germane to the occasion at hand:

E (a) a similar determination of the facts and the law arises in relation to MCAT's and the directors' claims against the defendant in respect of the libel claim relating to the publication of the articles in the newspapers and websites which are the crux of both the S6 suit and the S4 suit;

(b) a single judge hearing both the suits would be ideal as that judge would be F familiar to the entire factual matrix and the manner and circumstances surrounding the dispute between the parties in both the two suits; and

(c) if the S6 suit and the S4 suit are not tried by the same judge there is a possibility nay a strong probability that conflicting decisions may be arrived at based on the same facts.

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CONCLUSION

[38] It is part and parcel of my judgment that the S4 suit be transferred to this court which is hearing the S6 suit and be heard, one after the other, in order to enable H the just, efficient and uniform determination of the similar issues existing in these two suits and to avoid any conflicting decisions which may possibly arise. The very same issues of law and facts arise and call into question the very same rights to relief. The plaintiff in the S6 suit and MCAT's directors in the S4 suit will be required to furnish identical evidence in relation to their libel claim. If the matters are not heard by this court, one after the other, not only will the defendants have to expend time I and costs in defending both actions separately before a different judge, but it may also be prejudiced by any inconsistent finding of facts or law by two different courts. It is certainly in the interest of all the parties to expedite and not to delay both the suits. Consolidation of both the suits or transferring the S4 suit to this court – which is the preferred choice, is not an attempt to delay but rather to expedite matters and to

enable both the S4 suit and the S6 suit to be heard and disposed together or separately as expeditiously as possible by the same judge. Much judicial time will be saved as a result of transferring the S4 suit to this court. Now, the issue of whether or not there is a concluded contract between MCAT and the defendant is a central issue that lies for determination in this suit (the S6 suit) and the S4 suit. Since MCAT is the plaintiff in the S6 suit and MCAT's directors are the plaintiffs in the S4 suit, it would be appropriate that both the suits be heard by the same judge in the S6 court. There is no compelling reason why the transfer of the S4 suit to this court ought not to be ordered. It is to enable the just, efficient and uniform determination of the similar issues existing in both these two suits and to avoid any conflicting decisions that the same judge should be given the opportunity to hear the two suits one after another.

[39] For the reasons as adumbrated above, I made an order that the S4 suit be transferred to this court, the S6 court, and this court will hear and determine the S6 suit first and thereafter this court will hear and determine the S4 suit. Costs of the defendant's application in encl 19 would be costs in the cause. The case management is to proceed as usual.

[40] As I said, the reasons for allowing the consolidation in the S4 suit can be found in this judgment. There is therefore no necessity for me to write a separate judgment for the S4 suit.

[41] In regards to the S4 suit, the defendant's application in encl 12 is the same as the defendant's application in encl 19 in regard to the S6 suit. In regard to encl 12 of the S4 suit, I made an order that the S4 suit be transferred to this court (the S6 court) and that the hearing of the S6 suit be heard first and then followed by the hearing of the S4 suit. That the costs of the defendant's application in encl 12 be made costs in the cause.

[42] There is a note appearing in para 4/9/1 of The Supreme Court Practice 1991, vol 1 which reads as follows:

> There is a discretion to consolidate 'pending' actions, i.e. actions in which the writ has been served (*The Helenslea* (1881) 7 PD 57) and in which judgment has not yet been obtained and satisfied.

This note is certainly appropriate when considering encl 19 of the S6 suit and encl 12 of the S4 suit. What is of importance to note is that I have heard all the parties affected (*Daws v Daily Sketch & Sunday Graphic Ltd & Anor Darke & Ors v Same*) and I have decided accordingly.

[43] I anxiously await the hearing of the defendant's application in encl 35 that has been filed in the S6 suit for the stay of the proceedings pending appeal to the Court of Appeal. Enclosure 35 has been fixed for hearing on 16 May 2007.

ADDENDUM

[44] It is always interesting to hear libel and slander actions. According to Bowen L J in *Ratcliffe v Evans* (1892) 2 QB 524 at p 528, once a defamatory statement is made

in writing or is printed or is written in some other permanent form, then the tort of libel is committed and the law presumes that damage is done. And if a person is defamed orally, then it constitutes the tort of slander and there is a need to prove actual damage (*Stanhope v Blith* (1585) 4 Co Rep 15a; *Hopwood v Thorn* (1849) 8 CB 293; *Savile v Jardine* (1795) 2 Hy B1 531; and *Davies v Solomon* (1871) LR 7 QB 112).

[45] Why is there a need for libel and slander actions? It is to vindicate the plaintiff's reputation, if there is one in the first place (*Cassell & Co Ltd v Broome* [1972] AC 1027 at p 1071, [1972] 1 ALL ER 801 at p 824; and *Uren v John Fairfax & Sons Pty Ltd* (1965 – 1966) 117 CLR 118 at p 150). Usually, the defendant will put up the defence that the plaintiff has received no injury because the facts published or uttered are the truth. The defendant too may put up the defence of absolute privilege. The defence of qualified privilege, if raised, can be set aside if the plaintiff can prove actual malice.

[46] There must be publication before an action for libel is instituted (*R v Burdett* (1820) 4 B & Ald 95; *Entick v Carrington* (1765) 19 State Tr 1029; *Edwards v Wooton* (1607) 12 Co Rep 35; and *R v Stockdale* (1789) 22 State Tr 237 at 300). The words published must concern the plaintiff (*Baldwin v Elphinston* (1775) 2 Wm B1 1037, and *O'Brien v Clement* (1846) 16 M & W 159).

[47] The law books are replete with authorities on libel and slander. It can go on ad infinitum. I will consider all these authorities at the appropriate time. Until then, I will not say anymore. I must refrain from proceeding further. I keep an open mind.

Defendant's application allowed.

Reported by Navit Kaur Randhawa